

Retail Clerks Union Local 324, United Food and Commercial Workers International Union, AFL-CIO-CLC (Fed Mart Stores, Inc.) and Bessie L. Holt. Case 21-CB-7043

May 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On September 30, 1980, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs, and each party filed a brief in opposition to the other's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In the "Discussion" section of his Decision, the Administrative Law Judge incorrectly referred to Sec. 8(a)(1) of the Act rather than Sec. 8(b)(1)(A). We therefore correct this inadvertent error.

We agree with the Administrative Law Judge that Respondent violated Sec. 8(b)(1)(A) of the Act by misinforming employee Holt about the manner in which it would process her grievance on and after August 27, 1979, and by proceeding to process that grievance in a perfunctory manner. Contrary to our dissenting colleague, we find from credited testimony that Holt and Respondent's agents, Gunton and Steele, all clearly understood on August 27 that Respondent had agreed to seek reinstatement and backpay for Holt, in addition to sick pay and vacation pay. Then, without justification, Respondent told the Employer only 2 days later that Respondent would not "push" for Holt's reinstatement. Respondent never took any affirmative steps to secure either reinstatement or backpay for Holt, and it informed her in unconditional terms on September 15, 1979, that her grievance file was closed. Holt did not file an unfair labor practice charge until after receipt of this information.

Under these circumstances, there is no factual basis for the dissent's suggestion that Respondent's conduct was consistent with a plan to seek sick and vacation pay first, then to pursue Holt's reinstatement and backpay claim. We also reject the dissent's contention that Respondent's conduct fell within the purview of permissible discretion in grievance handling or entailed mere negligence. Having agreed to resume processing Holt's grievance, Respondent engaged in unlawful arbitrary conduct by failing to meet its representative duty not to purposely misinform Holt about the manner in which the grievance would be handled. See *Local 417, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Falcon Industries, Inc.)*, 245 NLRB 527, 534 (1980); *Groves-Granite, a Joint Venture*, 229 NLRB 56, 63 (1977). Furthermore, although Respondent could legitimately have exercised a wide range of discretion in deciding how to handle Holt's grievance, it specifically committed itself to seeking the full remedy of reinstatement and backpay. Respondent again engaged in unlawful arbitrary conduct by failing to pursue its commitment in more than a perfunctory manner. *Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, Local No. 106 (Owens-Illinois, Inc.)*, 240 NLRB 324, 325

Judge and to adopt his recommended Order, as modified herein.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Retail Clerks Union Local 324, United Food and Commercial Workers International Union, AFL-CIO-CLC, Buena Park, California, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Make Bessie L. Holt whole, with interest, for any loss of pay she may have suffered by reason of her failure to work for Fed Mart Stores, Inc., between April 6, 1979, and the date on which she secures substantially equivalent employment, all to be computed in the manner set forth in the section of the Administrative Law Judge's Decision entitled 'The Remedy.'"⁴

2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER FANNING, dissenting:

The complaint alleges a failure to process the grievance of employee Holt "since on or about August 27, 1979." This grievance was filed on April 11. As the Administrative Law Judge noted, Respondent's handling of the matter before August 27 is not attacked.

(1979); *Truck Drivers, Oil Drivers and Filling Station and Platform Workers Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Transport, Inc.)*, 209 NLRB 292 (1974).

³ The General Counsel excepts to the Administrative Law Judge's recommended Order that backpay date from August 29, 1979, the date Respondent's representative, Gunton, informed a representative of Fed Mart that Respondent was not going to seek to have Holt reinstated. The General Counsel contends that backpay should date from April 6, 1979, the date that Holt was terminated by Fed Mart. We find merit in this exception. In determining the extent of Respondent's financial liability, it is well established that Respondent must bear the burden of any uncertainty which is the direct product of its misinforming Holt concerning the manner in which it would process her grievance and processing that grievance in an apathetic, perfunctory, and arbitrary manner. Accordingly, we shall presume for purposes of computing Holt's backpay that she would have been entitled to full backpay beginning from the date of her discharge if Respondent had pursued Holt's grievance with due diligence. See, e.g., *Massachusetts Laborers' District Council of the Laborers' International Union of North America (Manganaro Masonry Co., Inc.)*, 230 NLRB 640 (1977); *Service Employees International Union, Local No. 579, AFL-CIO (Convalesce of Decatur d/b/a Beverly Manor Convalescent Center, et al.)*, 229 NLRB 692 (1977).

In addition, we note the Administrative Law Judge's inadvertent omission from the recommended notice of a promise by Respondent to refrain in the future from restraining or coercing employees in the exercise of their Sec. 7 rights. We shall include such promissory language in the attached substitute notice.

⁴ In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

On August 22 Holt was acquitted of petty theft charged by Fed Mart, her employer. She advised the Union of this by phone and a meeting was set up for discussion on August 27 concerning the action to be taken.

Holt had been a cashier in Fed Mart's store #220. The alleged theft occurred on April 6 and involved leaving the store with groceries for which Holt had not paid. The existing bargaining contract included a grievance and arbitration procedure. Holt wrote out her own grievance, characterizing the incident as a mistake and requesting the business representative "to investigate and reinstate me with all back wages."⁵

The Union prosecuted the grievance vigorously until it closed her case on June 15. Steele testified that he took the latter step because Holt had in the meantime suggested that she would settle for the vacation pay and sick pay due her on termination if Fed Mart would treat the matter as a voluntary quit. Steel tried that approach but Fed Mart refused. Holt's reason for that approach was that she "had never been in trouble with the law" and wanted nothing on her record. Steele rechecked with Holt in June about the matter and learned that she was still of the same mind. He concluded that it would not be possible to win an arbitration on that basis, and therefore wrote to her on June 15 closing her case.⁶

Upon receipt of this letter Holt called Steele. She understood from the conversation that the file was not closed finally and that "they would see what they could do" after she went to court.

Concerning the post-acquittal phone conversation with Steele, Holt's version was that she "now wanted her sick pay and vacation pay and everything she was entitled to." Asked if she wanted reinstatement, she replied "not really" but that she felt that she had to get it to clear the record and to look for another job. According to her testimony, Steele called her back the same day and set up the August 27 appointment.

Steele's version of the August telephone conversation was that Holt "wanted her moneys due her, her vacation and sick pay" and that she expressed doubt whether she wished to go back to her job.

Holt, Steele, and Gunton met in the latter's office on August 27. Holt's version of this discussion was that Steele asked if she had made up her

mind what she wanted, to which she replied, "Yes, I want everything now. I want my job back, my sick pay, my vacation pay and my back pay." Also, according to Holt, she recounted at that time the testimony of Fed Mart's security officer at her trial, to the effect that she was entitled to her job back if she was not guilty. At that point Gunton allegedly proposed that he would get the sick pay and vacation pay first, and then he would go after her reinstatement and backpay, a strategy to which Holt said she agreed because it would avoid the vacation and sick pay being held up if the case went to arbitration.⁷

Steele, in his version of the August 27 meeting, recalled no mention by Holt of "wanting to go back to work" for Fed Mart. He did recall Holt's comment as to what Fed Mart's security officer said about getting her job back and backpay. Gunton's version was that Holt asked them to pick up the money due her, that he made several calls to Fed Mart for that purpose, and that Holt called him almost daily concerning the matter. His answer was "no" when asked if she wanted backpay and reinstatement.

The release prepared by Fed Mart, in consideration of \$955.72, covered all claims arising out of Holt's "wage claim and termination." Holt signed this on September 11, after adding in her own writing the words "The above in regards to vacation and sick pay only." Neither Steele nor Gunton was present at the time, but the latter's secretary apparently spoke with Union President Sperry before authorizing Holt to make the addition to the release. The wording had been suggested to Holt by a lawyer whom she called from Gunton's office.

The Administrative Law Judge resolved the conflicts in testimony in favor of the Charging Party and concluded that Respondent acted in an "apathetic, perfunctory and arbitrary manner" in violation of its duty of fair representation. In my view the facts do not justify that conclusion. As I analyze this case there was at most a misunderstanding as to what Holt wanted after her acquittal other than a lump sum payment for vacation and sick pay. Lind of Fed Mart testified that Gunton, in requesting the vacation and sick pay, said "they were not going to push to have Bessie rehired." This was a statement calculated to get Holt a lump sum payment without further delay, as she obviously desired. The statement was also consistent with a plan to seek vacation and sick pay primarily, and

⁵ Holt had apparently been selected as a union steward. The field director of the Union testified that he may have seen her at a shop stewards' seminar in March 1979. Holt at one point in her testimony said that she "was going to be" a shop steward and had met Steele, the business representative of the Union.

⁶ This letter stated that the Union had been unable to resolve the grievance with the Employer and in accord with the bylaws was closing the file. The final paragraph said, "If I may be of assistance to you in the future, please do not hesitate to contact me."

⁷ Arbitration would appear to have been time barred at that time. However, the Administrative Law Judge found (ALJD, "Discussing," par. 6) that the actions of the parties after June 15 indicated that the grievance was still alive and that Fed Mart was proceeding on the assumption that arbitration had been requested.

to do so without definitively foreclosing further action. Holt in her testimony admitted that she understood that such benefits were due only upon termination, but saw no inconsistency in immediately thereafter seeking reinstatement.

In *San Francisco Web Pressmen and Platemakers' Union No. 4 affiliated with the International Printing and Graphic Communications Union of North America* (*San Francisco Newspaper Printing Company, Inc., d/b/a San Francisco Newspaper Agency*), 249 NLRB 88 (1980), the Board indicated quite clearly that it did not wish to be in the position of second-guessing a union's assessment of the merits of a grievance, emphasizing the fact that—as here—the union did not act through hostile motivation or harbor any animus. I would note that Holt's primary objective after her acquittal was promptly achieved by the Union. Barely a week passed before Holt filed the charge on September 19.⁸ It would be unreasonable on these facts to characterize the Union's handling of the matter as negligent, but in that area also the Board has said that it "do[es] not equate mere negligence with irrelevant, invidious, or unfair considerations." *General Truck Drivers, Chauffeurs and Helpers Union, Local No. 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Great Western Unifreight System)*, 209 NLRB 446, 447-448 (1974). In my concurrence in the latter case I said:

I am of the view that a union should be accorded a reasonable amount of discretion in the exercise of its representative function. [209 NLRB at 449.]

On this record I cannot agree with my colleagues that the Union "specifically committed itself" to seeking the full remedy of reinstatement and backpay. Holt had clearly agreed with the Union that getting the vacation and sick pay was important to her and should come first. The Union's next step was to request just that, and advise Respondent that it would not "push for" Holt's reinstatement, as the Administrative Law Judge recited in sec. B, par. 9, of his Decision. Having secured a type of payment applicable only when an employee was being terminated, Holt waited only a few days before urging the Union to seek *reinstatement* and *backpay* as well. Even though Holt admitted at the hearing that she understood the distinction between the two, it appears that, at the time she filed the 8(b)(1)(A) charge for arbitrary failure to process a grievance

concerning her discharge, she was oblivious to the inherent inconsistency in her position. In my view my colleagues are ignoring the time frame here and the patent unreasonableness of expecting the Union immediately to pursue reinstatement—with or without backpay. This is not a case of keeping the charging party uninformed, or misinformed, as in *Local 417, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Falcon Industries, Inc.)*, 245 NLRB 527 (1980); nor one of a bargaining agent's being influenced by considerations that were arbitrary, or actually in bad faith, as in *Groves-Granite, a Joint Venture*, 229 NLRB 56 (1977); nor one where the union reportedly stated that the employee did not have a valid grievance as in *Associated Transport, Inc.*, 209 NLRB 292 (1974). It is also not a case where the union performed in a perfunctory manner, a proposition for which *Truck Drivers, Oil Drivers and Filling Station and Platform Workers Local No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Associated Transport, Inc.)*, 209 NLRB 292 (1974), is cited.

Whether the Union here had a firm intention to secure reinstatement and backpay for Holt, as well as the vacation and sick pay it secured for her as "terminated," is, I believe, not significant. A union is entitled to exercise its discretion in processing grievances for the unit as a whole. This includes assessing the action urged by one employee in the context of future actions anticipated for other employees. It is a grave mistake, I believe, to hold a union responsible for failure to proceed with an action on behalf of an employee that, at the time, has no chance of success and would tend only to make more difficult the future processing of grievances on behalf of the unit.

I would dismiss the complaint here.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, in certain ways. We have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

⁸ On September 24, after the filing of the charge here, a letter was addressed to the Union by an attorney for Holt. It enclosed "documentation" from the criminal file and requested the Union to seek reinstatement and backpay.

WE WILL NOT fail to process your grievances to conclusion for no reason or for arbitrary or invidious reasons.

WE WILL NOT deliberately misinform you about the manner in which we will process your grievances.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Bessie L. Holt whole, with interest, for the wages she lost because of our failure to fully process her grievance.

RETAIL CLERKS UNION LOCAL 324,
UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
AFL-CIO-CLC

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge: This case was heard by me in Los Angeles, California, on April 24, 1980, based on a complaint issued on November 7, 1979,¹ pursuant to a charge filed on September 19. The complaint alleges that, since on or about August 27, the Respondent arbitrarily failed to process a grievance concerning the discharge of Bessie L. Holt, thereby failing "to represent Holt for reasons which are unfair, arbitrary, invidious, and a breach of the fiduciary duty owed the employees whom it represents," in violation of Section 8(b)(1)(A) of the National Labor Relations Act, as amended. In addition to denying the commission of an unfair labor practice, the Respondent alleges as affirmative defenses that the complaint fails to state a violation of the Act; the Charging Party failed to exhaust her internal union remedies after the Respondent closed her grievance on or about June 15; and the Board "is without authority and/or jurisdiction to award backpay against a labor organization in a breach of the duty of fair representation case." All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Briefs were filed by both the General Counsel and the Respondent and have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, and having considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Fed Mart Stores, Inc., a California corporation, is engaged in the retail sale of goods through a chain of stores in California, including a facility in Anaheim, California. Its annual gross sales exceeds \$500,000 and its annual purchases of goods and products which it re-

ceives directly from suppliers located outside California exceeds \$50,000. The parties stipulated, and it is found, that Fed Mart Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and it is found, that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Setting

Bessie Lee Holt commenced working as a cashier for Fed Mart in its Anaheim store in February 1972. At all material times, the Respondent and Fed Mart had been parties to a collective-bargaining agreement covering a unit which includes the cashiers which contains a grievance and arbitration procedure. The record shows that Holt has filed three grievances under the contract, the first in July 1975 concerning her termination for "overages and shortages" in her cash register, and which resulted in her reinstatement with backpay following arbitration in December 1976. She filed a second grievance after her reinstatement, apparently alleging that management was harassing her with respect to her days off. Holt was advised that the Employer could dictate days off and the Union could not do anything about it. Nothing came of the grievance. The third grievance, which was filed on April 11, gave rise to the instant charge. At all material times, John Steele has been a business representative for the Respondent, and Bob Gunton has been the Respondent's coordinator of business representatives. Respondent admits that at all material times both men have been its agents.

B. Events Giving Rise to Holt's Grievance of April 11

Holt was terminated on April 6 because, according to a letter sent the Respondent, "Bessie Holt walked out of the store with several bags of groceries (non-payment)."

Holt testified that she had done some shopping in her employer's store during one of her breaks on April 6 and had pushed the grocery cart containing the items she selected through the check stand to an area where "go-backs"² are placed and wrote "do not return" on the bag.³ She testified that none of the other cashiers had been able to cash her paycheck and that she intended to pay for the items when someone was able to cash her check. At or about 2 p.m., cashier Kim Perez was checking out to go home, and, according to Holt, she asked if Perez could cash her check and ring up her groceries. Holt gave Perez her check, and Perez in return gave Holt some cash, which Holt contends she did not count, and a cash register receipt which she did not look at. Perez, in fact, had not rung up the groceries which were

² Groceries that customers decided at the last minute they did not want.

³ The cart contained several packages of beverage soda and cartons of cigarettes.

¹ All dates herein are in 1979 unless otherwise stated.

located several cash registers away. In the meantime, the store manager had observed Holt removing the merchandise from the shelves and asked cashier Terry Mullen to see if Holt paid for the merchandise. As Holt left the store, the security officer stopped her and asked to see the sales receipt. When she was unable to produce a receipt, she was asked to return to the manager's office, where she continued to insist she had paid for the items. After it became evident to all concerned that she had not in fact paid, the Anaheim Police Department was called and Holt was issued a citation for petty theft. She testified she was then either laid off or terminated.

On April 11, Holt filed the following grievance:

I was terminated on 4-6-79 by Ron Roberts for taking merchandise that was not paid for. This was a mistake and I would like my Business Rep. to investigate and reinstate me with all back wages.

Steele, who was assigned to handle the grievance, was on vacation at the time of its filing. Nevertheless, a letter was sent to the Employer over his signature on April 11, protesting the termination and requesting that the Employer furnish the immediate cause of the discharge. Steele returned from vacation on April 16, saw Holt's grievance on April 17, and on April 18 received a letter dated April 16 from Harvey Berger, Fed Mart's industrial relations representative, stating that Holt and another employee had been terminated for security reasons, Holt having "walked out of the store with several bags of groceries (non-payment)." On the same date, Steele contacted Holt and asked her to come in and see him for the purpose of supplying a statement. Also on April 18, Steele went to the store and talked to cashiers Kim Perez and Terry Mullen, and also to Store Manager Vic Young who was not at the store when the incident involving Holt had occurred. Steele testified that Mullen told him a security guard had observed Holt putting merchandise in a cart, and that Roberts asked Mullen to watch and see if Holt paid for the merchandise; that he observed that it was not paid for; that Holt was stopped outside the store and brought back to the office; that the Anaheim Police Department was called and Holt was given a citation. Perez told Steele that Holt had walked behind her in the check stand with a basket containing "six cases of pop and a bag of something";⁴ that she asked Holt if she was going to pay for it; that Holt answered affirmatively and took it to checkstand 12 where the "go backs" were placed, and wrote "Hold for Holt" on it. Perez denied she checked out the items, and Steele's examination of Perez' cash register "detail tape" disclosed no total for the amount of merchandise which Holt had removed from the store.

On April 19, Steele sent a letter to Berger requesting a meeting to discuss Holt's termination. On April 27, Holt went to the Respondent's office and gave Steele a written statement containing her version of the circumstances surrounding her termination. The statement, in evidence as Joint Exhibit 8, reads:

STATEMENT BY BESSIE HOLT - FED MART #220

⁴ Eight cartons of cigarettes.

On April 6, 1979, I was on my first break, at approximately 12:00 noon, and went back and picked up some things I needed to take with me on vacation. No one could cash my check so I hauled the cart through and told Kim, the checker, that I was going to pay for it when I got my check cashed. I put the small stuff that would go in a bag in a bag and wrote "Do not return-Holt for Bessie or Holt" all over it.

Then about 2:00 P.M., Kim was going home early, so I asked her if she had the money to cash my check and ring up my groceries. I was waiting on a customer, and she said "Yes" [sic] but I would have to get it in fives and tens as she didn't have any big bills. I gave her my check and didn't think about the groceries. She gave me the money and told me to count it. The customer was complaining about it being on their time so I told Kim that it's there. She said it should be 61¢ change, I said there was 60¢ here and then told her "Yes, the penny is here." I put it all in my cigarette case without counting it. Kim was closing her register at this time.

I dod [sic] not think any more about the groceries until I got off at 6:30. I went over and took the basket, asking checker, Jeff Linderman how he liked my name all over everything and said at least they did not put it back. I then walked out of the store, and they stopped me.

/s/ Bessie L. Holt 4/27/79

Holt testified Steele told her that if she walked out of the store with the groceries, she was definitely guilty; to which she replied that she had thought so too, but that her attorney had told her that that was not so because she had no intention of stealing. She testified that Steele told her that there was nothing that could be done until she went to court and it was proven she was not guilty. On May 8, Steele sent another letter to Berger renewing his April 19 request to meet, and on May 16, sent a letter to Fed Mart Industrial Relations Representative Judy Gieseke stating that, if a response was not received to the earlier request for a meeting, the Respondent would take Holt's and another grievance to arbitration.

Holt testified that, sometime in May, she called and asked Steele to request the company to give her accrued sick and vacation pay, a voluntary quit, and to drop the petty theft charges to forestall the embarrassment of going to court. While Steele testified Holt did not ask that the charges be dropped, I conclude that the request for a voluntary quit carried with it the implication that the charges would be dropped. Pursuant to the request, Steele called Gieseke and was advised that, in view of the pending petty theft court case, Fed Mart was not willing to give her a voluntary quit at that time. Holt testified Steele told her that Fed Mart personnel "said that they would discuss sick pay and vacation pay and everything after I went to court, not before." Steele testified that, in a subsequent conversation on June 14, Holt again stated she wanted to get a voluntary quit. Steele testified that on June 15, after having "gone through my

investigation" which consisted of talking to the two Fed Mart employees involved in the termination, and to Holt, he decided he could not win an arbitration and therefore sent Holt a letter closing the case. The letter, Joint Exhibit 12, reads as follows:

Ms. Bessie Holt
2121 S. Artesia
Santa Ana, California 92704

Dear Sister Holt:

After a thorough investigation and following the dispute procedures under the contract, the Union has been unable to resolve your grievance with your employers.

Therefore, we will be unable to process your grievance further and in accordance with the Local Union Bylaws we are closing your file.

If I may be of assistance to you in the future, please do not hesitate to contact me.

Fraternally,

RETAIL CLERKS UNION LOCAL 324

/s/ John Steele

John Steele

Business Representative

for John C. Sperry

President

Holt testified that after receiving the letter she called Steele for an explanation and:

He told me there was nothing else that can be done and I asked him, "Well, after I go to court, then you can open it back up or something; can't you?" And he says, "Well, after you go to court then" he says—"then maybe we can help you if you are not guilty," and everything. He said, "The thing to do is, when you go to court, call me after—you know, if you're found guilty, call me and let me know and then we'll open it back up and do what needs to be done."

Holt's jury trial for petty theft took place from August 20 to 22. She was found not guilty.

According to Holt, a couple of days later she called Steele "and told him that I was found not guilty and that now I wanted my sick pay and vacation pay and everything that I was entitled to." Asked if she wanted reinstatement, she testified she replied, "Not really," but that she felt it would be easier to get another job if she was still working at Fed Mart and could use them as a reference. According to Steele, Holt stated "she wanted her monies due her, her vacation and sick pay." It appears from their testimony that Steele understood Holt's answer to mean that Holt did not know whether she wanted reinstatement.

Steele then set up a meeting in Gunton's office between Gunton, Steele, and Holt for August 27. According to Holt, she was asked by Steele if she had made up her mind what she wanted from Fed Mart, and that she responded, "Yes, I want everything now I want my job back, my sick pay, my vacation pay and my backpay." She went on to state that, at her trial, Security Officer

Le Wan had testified that, if she was not guilty, the Company had no reason to fire her, and that she was entitled to get her job back.⁵ According to Holt, Gunton responded that he would first try to get the sick pay and vacation pay because, on the basis of the verdict in the jury trial, Fed Mart owed her those items under the contract, and that he would later go after reinstatement and backpay. Steele testified he did not recall Holt saying anything about wanting reinstatement, and Gunton denied she stated she wanted either backpay or reinstatement. There is no doubt, however, that everyone agreed that Gunton would seek to obtain sick pay and vacation pay for Holt under the contract.

On August 29, Gunton called Joan Lind, the industrial relations representative of Fed Mart who was at that time responsible for handling grievances. According to Lind, Gunton informed her that Holt had been found innocent and that he was requesting that Holt's sick pay and vacation pay be paid to her, and that the Respondent was not going to push to have her rehired. Lind checked with corporate authorities, who authorized payment of sick and vacation pay. In a later conversation, she advised Gunton that a check would be forthcoming and that it was to be understood that the arbitration was to be withdrawn. Gunton checked his file and informed her that no request for arbitration had been filed. According to Holt, after the check was apparently delayed, Gunton gave her Lind's telephone number, but cautioned her not to mention anything about backpay and reinstatement since he did not want Fed Mart to know of his intention with respect to those items until after Holt had received her check for sick pay and vacation pay.

On September 11, Steele picked up the check in the gross amount of \$1,158.53 for delivery to Holt. Enclosed with the check were two copies of a general release for both Holt and an official of the Respondent to sign. In essence, it was a release of all claims against Fed Mart arising out of the wage claim and termination of Holt. Holt objected to signing the release, but after conferring with her attorney by telephone, did so after adding in longhand at the end "The above in regards to Vacation and Sick pay only" Gunton informed Lind of Holt's action, and the release was returned to Fed Mart with Steele's signature affixed for the Respondent.

A couple of days later, Holt called Gunton and asked when he was going after her backpay and reinstatement, and was told that, since she had signed the release, there was nothing he could do, and that, the grievance had been closed by the June 15 letter. Gunton testified he did not recall any conversations with Holt after the release was returned to Fed Mart. Respondent has taken no further steps to recover backpay or reinstatement for Holt. By letter dated September 24, the Respondent was advised that Holt had retained an attorney with respect to her contention the Union should effectuate her reinstatement with backpay.

⁵ Whether Le Wan was employed by Fed Mart or by an independent security agency and the extent of his authority was not explored.

Discussion

The General Counsel does not attack the Respondent's initial handling of Holt's grievance. It is contended, however, the Respondent violated the Act by its failure to complete the processing of Holt's grievance in August. It is contended that, when Gunton told Holt in the August 27 meeting that he would seek to have the Employer reinstate her with backpay, he committed the Respondent to use its full resources to accomplish that end, and that when he later, on his own initiative, advised Lind that he was "not going to push to have Bessie [Holt] rehired," he acted arbitrarily, discriminatorily, and in bad faith, thereby breaching the Respondent's duty of fair representation in violation of Section 8(b)(1)(A) of the Act. The General Counsel contends Gunton further breached its duty to Holt by misleading her about the processing of her grievance, and by telling her not to discuss her reinstatement and backpay with Lind, thereby interfering with her ability to obtain reinstatement and backpay through other unnamed channels.

The Respondent would divide the case into two time frames: (1) from April 11, when Holt filed the grievance, through June 15 when the Respondent closed the grievance; and (2) from August 23, when Holt contacted the Respondent after she had been acquitted of the petty theft charge. With respect to time frame one, the Respondent points out that it not only contacted the Employer promptly regarding the incident for which Holt was discharged, but also took a detailed statement from Holt and interviewed the other employees who had observed the incident upon which the discharge was based. After investigating the matter, it was concluded in good faith that it would be pointless to take the grievance to arbitration; accordingly, Respondent advised Holt the grievance was closed. With respect to the period covered in time frame two, Respondent points out that since the notice that the matter would be submitted to arbitration was dated May 16, and as the grievance was properly closed on June 15, in August the grievance was time-barred by the collective-bargaining agreement and arbitration was an impossibility.⁶ The Respondent contends, further, that the weight of the evidence shows that the Union pursued and obtained all benefits desired by Holt; namely, sick and vacation pay. The Respondent argues that Holt's testimony, and that she requested the Respondent's agents to obtain reinstatement, backpay, vacation, and sick pay, are inconsistent in that vacation and

sick pay are benefits due on termination of employment; therefore, it would be ludicrous to suggest that the Union, which handles approximately 25 grievances per week, would seek termination benefits and reinstatement and backpay at the same time. The Respondent also argues that Holt's failure to exhaust internal union remedies precludes an action against the Union for breach of the duty of fair representation.

In making an assessment of the credibility of the witnesses, I was impressed with the sincerity of Holt and Lind, who seemed to make a sincere effort to recall conversations. On the other hand, the testimony of both Steele and Gunton was punctuated with lack of recollection and failures to deny testimony. In at least one instance they contradicted each other and, of course, were contradicted in several respects by Holt, and Gunton was contradicted by Lind. Accordingly, I credit both Holt and Lind over Gunton and Steele wherever there is a conflict in testimony.

Much has already been written regarding the Union's duty of fair representation. Although an employer may discharge an employee for no reason at all without violating the Act, unions have obligations to employees they represent that employer's do not. A union's obligation was discussed recently by the Board in *San Francisco Web Pressmen and Platemakers' Union No. 4 affiliated with the International Printing and Graphic Communications Union of North America (San Francisco Newspaper Printing Company, Inc., d/b/a San Francisco Newspaper Agency)*, 249 NLRB 88, 89 (1980), wherein it stated:

A union violates its duty of fair representation to bargaining unit members when it "arbitrarily ignore[s] a meritorious grievance or process[es] it in a perfunctory fashion." *Vaca, et al. v. Sipes*, 386 U.S. 171, 191 (1967). We have recently stated that where, as here, a union undertakes to process a grievance was perfunctory or motivated by ill-will or other invidious considerations. *Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, Local No. 106 (Owens-Illinois, Inc.)*, 240 NLRB 324 (1979).

As in the *San Francisco Newspaper* case, there is no evidence here upon which to make a finding that the Respondent acted through hostile motivation or harbored any animus against the discharged employee. The issue is then reduced to whether the Respondent processed the grievance in a perfunctory fashion by failing to insist that Holt receive reinstatement and backpay, and whether it misled her about processing the grievance, thereby interfering with her ability to obtain reinstatement and backpay through other channels.

If, in fact, Holt's grievance had been finally determined and put to rest on June 15, when the Respondent advised Holt that her file was being closed in accordance with the Local Union's bylaws, this complaint would have no merit, since the Board has repeatedly held that a labor organization is not required automatically to process a grievance if it in good faith believes that the grievance is without merit and it would be pointless to carry it to arbitration. I have no doubt that, on June 15, the

⁶ Art. XIV of the collective-bargaining agreement provides, in pertinent part:

Section B, Paragraph 2: Meeting of Representatives. Upon receipt of a written notice from either party, the representatives of the Employer and the representatives of the Union shall meet within a calendar week and attempt to settle or resolve the matter.

Section C, Paragraph 1. (a) Any matter not satisfactorily settled or resolved in Paragraph B hereinabove shall be submitted to arbitration for final determination upon written demand of either party. The written demand for arbitration may be made at any time after the expiration of fifteen (15) days but not alter than sixty (60) days from the date of the notice, submitting the matter under Paragraph B, Section 2, hereinabove, to the meeting of representatives. Failure to comply with the time limits set forth in this Paragraph and in Paragraph B, Section 2 above, shall render such grievance null and void.

Section C, Paragraph 1. (c) Any of the time limits set forth in this Article XIV may be extended by mutual agreement.

Respondent believed Holt's grievance lacked merit. It appears, however, that Fed Mart was not informed that the Respondent had abandoned the grievance at that time, and it is clear from both the Gunton-Steele-Holt conversation of August 27, and the Gunton-Lind telephone conversation of August 29, that both the Respondent and Fed Mart were proceeding upon the assumption that the grievance was not dead, and that Fed Mart in fact thought it was pending arbitration. In this regard, there was no evidence that Fed Mart ever received a copy of the June 15 letter advising Holt that her "file" had been "closed" in accordance with the Local Union's bylaws. Moreover, it does not appear from the record that Gunton realized Holt's grievance had not been set for arbitration until sometime after August 27 when Lind sought from him an assurance that the grievance would be dropped. Thus, even though the grievance had been "closed" insofar as the Local Union's bylaws may have been concerned, the Respondent continued to represent Holt pursuant to the grievance, and Fed Mart proceeded on the assumption that the grievance was still pending and arbitration had been requested. In light of these circumstances, it appears that if in fact the June 15 letter had any effect upon the disposition of the grievances—and I am not convinced that it did—that by their actions following Holt's acquittal, the parties had, pursuant to article XIV, C, 1 (c), of their collective-bargaining agreement, extended the time limits set forth therein. In this regard, Gunton acknowledged he was proceeding under the guise of Holt's grievance when he talked to Lind on August 27. Furthermore, he testified that while he had concurred in the "closing" of the grievance on June 15, he was not aware that Holt's petty theft trial was coming up. Steele's apparent failure to inform Gunton of the forthcoming trial, and the "closing" of the file prior to the trial, indicates a rather cavalier approach to Holt's grievance.

I credit the testimony of Holt to the effect that, in May, Steele told her that Fed Mart would not discuss sick or vacation pay or anything else until after the criminal trial.⁷ I further credit Holt's testimony that, after receiving the letter of June 15, she called Steele and that he told her to contact him if she was found not guilty and that the Respondent would "open it back up and do what needs to be done." On cross-examination, Steele admitted that, after the trial, when Holt called to inform him of the outcome, he asked if she wanted her job back. It is clear from the credited testimony that while she in fact expressed some reservation about reinstatement at that time, she informed him, and Steele admitted she did, that she wanted "vacation pay, backpay, sick pay and monies that was due her." I further credit Holt's testimony that, when she met with Gunton and Steele, she stated she wanted reinstatement and backpay in addition to sick and vacation pay, and that Gunton told her that they would first seek to recover sick and vacation pay, and then go after reinstatement and backpay. I further credit Lind's testimony that Gunton called and asked for only sick and vacation pay and stated that

the Respondent did not seek to have Holt reinstated. Thus, the Respondent not only misled Holt about the processing of her grievance, but then proceeded to "represent her" in an apathetic and perfunctory manner. Having undertaken to process Holt's grievance, the Respondent was thereafter obligated to dispose of it in accordance with its duty of fair representation.

As stated by Administrative Law Judge Richard J. Boyce in *Groves-Granite, a Joint Venture*, 229 NLRB 56, 62-63 (1977):

A union is permitted a wide range of discretion in determining whether and how to handle employee grievances, so long as its determination is not colored by considerations that bear on union membership or are otherwise arbitrary or in bad faith.³⁰ Misconduct ordinarily cannot be inferred from a union's simple refusal to institute grievance action;³¹ nor does negligence or poor judgment, untainted by improper considerations, give rise to a violation.³² As in other dealings with those it represents, however, a union may not purposely keep employees uninformed or misinformed concerning their grievances;³³ and, having committed itself to the prosecution of a grievance, a union is under a duty to present it most favorably to the employee.³⁴

³⁰ *Vaca v. Sipes*, U.S. 171 (1967); *Bazarte v. United Transportation Union*, 429 F.2d 868 (C.A. 3, 1970); *Figueroa v. Sindicato de Trabajadores Packinghouse, AFL-CIO*, 425 F.2d 281 (C.A. 1, 1970); *Buffalo Newspaper Guild, Local 26, American Newspaper Guild (Buffalo Courier Express)*, 220 NLRB 79 (1975); *Local 575, Packinghouse Division, Amalgamated Meat Cutters and Butcher Workmen (Omaha Packing Co.)*, 206 NLRB 576, 579 (1973).

³¹ *Vaca v. Sipes*, *supra*, at 386 U.S. 191.

³² *Bazarte v. United Transportation Union*, *supra* at 872.

³³ Cf. *Local No. 324, International Union of Operating Engineers (Michigan Chapter, AGC)*, 226 NLRB 587 (1976); *Asbestos Workers, Local No. 5 (Insulation Specialties Corp.)*, 191 NLRB 220, 221 (1971).

On the basis of the foregoing, I conclude and find that the Respondent failed to comply with its obligation to refrain from misinforming Holt concerning the manner in which it would process her grievance, and then proceeded to process her grievance in an apathetic, perfunctory, and arbitrary manner, all in violation of its duty to fairly represent Holt, thereby violating Section 8(a)(1) of the Act. *Local 417, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Falcon Industries, Inc.)*, 245 NLRB 527 (1979); *Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, Local No. 106 (Owens-Illinois, Inc.)*, *supra*; *Groves-Granite*, *supra*.⁸

⁸ The Respondent's affirmative defense that Holt failed to exhaust internal union remedies, after it closed her grievance on or about June 15, has been determined by the Supreme Court to lack merit. *N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, et al. [United States Line Company]*, 391 U.S. 418 (1968). Further, the Board's customary remedy, approved by the Court, has been to award backpay in cases against labor organizations for failure to fairly represent employees. Accordingly, Respondent's affirmative defense based on that proposition also lacks merit.

⁷ This appears to be consistent with the procedure followed by the Respondent and Fed Mart.

CONCLUSIONS OF LAW

1. Fed Mart is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1)(A) of the Act by failing to fairly represent Bessie L. Holt regarding her grievance against the company, and by willfully misinforming her about the processing of her grievance.
4. The foregoing unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found that the Respondent has violated the Act in certain respects, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As a result of the Respondent's unlawful conduct, Holt's entitlement to any possible reinstatement by Fed Mart ended with the execution of the release which she executed on November 9, and it is unlikely Fed Mart would agree at this point and in these circumstances to now submit her discharge to arbitration. Even if it did, however, the chances of a result favorable to Holt would be much less than if the Respondent had processed the grievance as it represented it would. Therefore, I agree with the General Counsel that an immediate backpay order is appropriate. Accordingly, I shall recommend the Respondent be required to find substantially equivalent employment for Holt, and make her whole for any loss of earnings she may have suffered because of the Respondent's unlawful conduct, by payment of a sum of money equal to that which she normally would have earned as wages from August 29, the date Gunton informed Fed Mart that it was not going to seek to have Holt reinstated, to the date substantially equivalent employment is found for her, less her net earnings during such period with backpay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).⁹

The Respondent will also be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

⁹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER¹⁰

The Respondent, Retail Clerks Union Local 324, United Food and Commercial Workers International Union, AFL-CIO-CLC, Buena Park, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing or refusing to process the grievances of Bessie L. Holt, or any other employee, or processing such grievances in a perfunctory manner, without reason or for arbitrary or invidious reasons.

(b) Willfully misinforming Bessie L. Holt or any other employee concerning the manner in which it intends to process her grievance.

(c) In any like or related manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make Bessie L. Holt whole for any loss of pay she may have suffered by reason of her failure to work for Fed Mart Stores, Inc., between August 29, 1979, and the date on which we find her substantially equivalent employment, in the manner set forth in the part of this Decision entitled "The Remedy."

(b) Post at its offices and meeting halls copies of the attached notice marked "Appendix."¹¹ Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Furnish signed copies of the notice to the Regional Director for Region 21 for posting by Fed Mart Stores, Inc., said employer being willing, at all locations where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."